

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

                      
No. 77-5549  
                    

MICHAEL TAYLOR,  
                    Petitioner,

v.

COMMONWEALTH OF KENTUCKY,  
                    Respondent.

                      
ON WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF KENTUCKY  
                    

                      
PETITIONER'S REPLY BRIEF  
                    

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when petitioner's counsel requested and tendered such an instruction.

2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give an instruction on the indictment's lack of evidentiary value when petitioner's counsel requested and tendered such an instruction.

WILL NOT BE PRINTED  
FOR ARGUMENT

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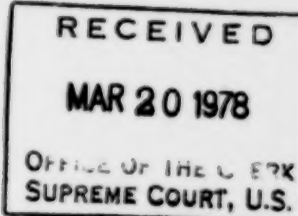
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J. VINCENT APRILE II  
ASSISTANT DEPUTY PUBLIC DEFENDER  
Third Floor  
State Office Building Annex  
Frankfort, Kentucky 40601  
  
Attorney for Petitioner



## ARGUMENT

- I. PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

In response to this argument, the Commonwealth of Kentucky has challenged the viability of this Court's decision in Coffin v. United States, 156 U.S. 432 (1895), by asserting that "the requirement stated to the lower federal trial courts in Coffin that an instruction on the presumption of innocence was required was based upon a fundamental fallacy" (Respondent's Brief, p. 7). The implication of the Commonwealth's argument is that the Coffin decision no longer mandates the federal trial courts to instruct on the presumption of innocence when requested. Certainly the statement in Coffin that the presumption of innocence is evidence to be considered in favor of the accused has been eroded, if not negated, by this Court's later decisions in Agnew v. United States, 165 U.S. 36 (1897), and Holt v. United States, 218 U.S. 245 (1910), but that factor has not undone the basic holding of Coffin. As recently as 1974, the court in United States v. Fernandez, 496 F.2d 1294, 1298 (5th Cir. 1974), emphasized that "the Coffin holding that it is prejudicial error not to instruct on the presumption [of innocence] when requested" is still "[o]f unimpaired vitality" in the federal courts. Even United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974), a case cited with approval by the respondent, emphasizes that a defendant in a federal criminal prosecution "is entitled to have his jury apprised of [the reasonable doubt] standard and its corollary, the presumption of innocence."

The Commonwealth also relies heavily on the comment in United States Ex Rel. Campagne v. Follette, 306 F. Supp. 1255, 1257 (E.D.N.Y. 1969), that "the cases in the Supreme

Court cannot be said to adumbrate a rule of constitutional rigidity that fair trial by jury requires that a court charge the presumption of innocence whether it is requested or not in addition to giving an adequate charge on reasonable doubt" (emphasis added).

As the court in Campagne apparently realized, this Court in Coffin, supra, and in Cochran v. United States, 157 U.S. 286 (1895), had addressed the specific issue of whether the protection of an instruction on the presumption of innocence could be denied, when requested, by the defendant. Indeed, none of this Court's decisions on the failure to instruct on the presumption of innocence had dealt with a trial judge's sua sponte duty to issue such an instruction.

In Campagne, supra, the federal court explained that "New York has consistently required the charge [on the presumption of innocence] to be given when requested." Id. at 1257. In fact, the charge on the presumption of innocence at that time "was usually given in New York" and "a failure to give it" was "ordinarily, reversible error." Id. at 1256. Significantly, the defendant's counsel in Campagne had neither tendered an instruction on the presumption of innocence nor objected to the trial court's omission to charge the jury on the presumption of innocence. Thus, the issue in Campagne was whether a state trial judge's failure to instruct sua sponte on the presumption of innocence constituted a denial of due process under the federal constitution. With the record in this posture, the federal court in Campagne was unable to construe the precedents in Coffin and Cochran, both supra, as dictating a federal constitutional principle that the absence of an instruction on the presumption of innocence, regardless of the circumstances, always denies a defendant a fair trial by jury and due process.



Additionally, the Campagne court delineated the panoply of instructions given by the state trial judge and noted the myriad cautionary instructions which were given to protect the defendants against an unwarranted conviction. Id. at 1258. For example, the jury was instructed, inter alia, that the indictment was not evidence against the defendants; that the defendants did not have to establish their innocence; that the prosecution had to prove its case by honest, credible evidence; that the proof had to be beyond a reasonable doubt; that the jury were the sole judges of the facts and the credibility of witnesses; that the identification evidence had to be weighed with the utmost caution and had to be sufficiently certain to preclude every possibility of mistake; that no unfavorable inference was to be drawn from a defendant's failure to testify; and that the defendant had no duty to establish his alibi beyond a reasonable doubt since the prosecution's burden of proving guilt beyond a reasonable doubt never shifted from the prosecution's shoulders. Id.

The abundance of cautionary instructions in the Campagne case is in marked contrast to the paucity of instructions given by the state trial judge in Michael Taylor's case.

When the circumstances present in Campagne and those of Michael Taylor's trial are juxtaposed, it is readily apparent that the two cases are inapposite.

According to the Commonwealth of Kentucky, this Court in Howard v. Fleming, 191 U.S. 126 (1903), specifically held that "a refusal by a state court to instruct on the presumption of innocence is not a denial of due process" (Respondent's Brief, p. 8). At the inception of its opinion, this Court in Howard observed that once a state court has affirmed the validity of the proceedings in a state trial, this Court "may not interfere with its judgment unless some right

guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial." Howard v. Fleming, supra at 135. This Court in the cited case noted that "[i]t does not appear that the Federal character of the questions was presented to the supreme court of the state." Id. at 137. Within this context, this Court in Howard, supra, never reached the merits of the issue argued by the defendants that "there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence." Id. at 136.

Assuming arguendo that this Court would accept the Commonwealth's strained interpretation of Howard v. Fleming, supra, it must be recalled that some seventy-three years after Howard was decided this Court enunciated in Estelle v. Williams, 425 U.S. 501 (1976), that "[t]he presumption of innocence...is a basic component of a fair trial under our system of criminal justice" and that this "right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Id. at 503. Even if in 1903 this Court had not recognized that the presumption of innocence was part and parcel of the Fourteenth Amendment's guarantee of due process in state trials, it is beyond cavil that the parameters of due process now embody the full protection of the presumption of innocence.

Accordingly, the decision of the state appellate court in the instant case to deny Michael Taylor the protection of an instruction on the presumption of innocence was "plainly inconsistent with the constitutionally rooted presumption of innocence" and "so infected the entire trial that the resulting conviction violates due process." Cool v. United States, 409 U.S. 100 (1972); Cupp v. Naughten, 414 U.S. 141 (1973).

II.

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

Asserting that this argument "is totally barren of a substantial federal question," the Commonwealth maintains that Michael Taylor has cited no authority to raise this issue to "constitutional stature" (Respondent's Brief, p. 22).

Respondent's simplistic evaluation of this argument's constitutional ramifications obviously emanates from a failure to heed this Court's directive in Estelle v. Williams, 425 U.S. 501, 503 (1976), that implementation of the presumption of innocence requires constant vigilance against "factors that may undermine the fairness of the fact-finding process." Procedures which dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt" cannot be countenanced. Id.

While "[t]he actual impact of a particular practice on the judgment of jurors cannot always be determined," this Court "has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." Id. at 504, citing Estes v. Texas, 381 U.S. 532 (1965), and In re Murchison, 349 U.S. 133 (1955). Consequently, "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." Estelle v. Williams, supra at 504.

Assessed against these constitutional precepts, the overemphasis of the indictment, whether intentional or inadvertent, generated a substantial risk that the jury would erroneously construe the indictment as evidence of Michael Taylor's guilt of the charged offense. In this context, the requested instruction on the indictment's lack of evidentiary value was the only feasible method of implementing the constitutionally mandated presumption of innocence

without emasculating the prosecution's right to have the indictment read to the jury.

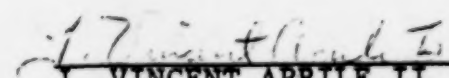
The Commonwealth's tactic of addressing this issue in the abstract, without attention to the circumstances of the case at bar, reveals a basic misunderstanding of the constitutional interplay between the dynamics of the presumption of innocence and the Fourteenth Amendment's guarantee of the right to a fair trial. Estelle v. Williams, supra at 503; Drope v. Missouri, 420 U.S. 162, 172 (1975). The trial court's refusal to give the instruction at bar was "plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104 (1972).

In the absence of an instruction on the presumption of innocence, the trial judge's decision to deprive Michael Taylor of the protection of an instruction on the indictment's lack of evidentiary value constituted a denial of due process, sufficient in magnitude to necessitate a reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Kentucky affirming petitioner's conviction should be reversed upon either or both of the grounds delineated above.

Respectfully submitted,

  
J. VINCENT APRILE II  
ASSISTANT DEPUTY PUBLIC DEFENDER  
Third Floor  
State Office Building Annex  
Frankfort, Kentucky 40601

Attorney for Petitioner

MARCH, 1978